



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

David Donnelly, Director
Campaign Money Watch
1828 L Street, NE, Suite 250
Washington, DC 20036

MAY 29 2009

RE: MUR 6023

Dear Mr. Donnelly:

On May 19, 2009, the Federal Election Commission ("the Commission") reviewed the allegations in your complaint dated June 9, 2008, and found that on the basis of the information provided in your complaint and information provided by the respondents, there is no reason to believe that John McCain 2008, Inc. and Joseph Schmuckler, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b), 441a or 441b; no reason to believe that Rick Davis and 3eDC, LLC violated 2 U.S.C. §§ 441a or 441b; no reason to believe that The Loeffler Group, LLP violated 2 U.S.C. § 441a; and no reason to believe that Susan Nelson violated the Federal Election Campaign Act of 1971, as amended. Accordingly, on the same date, the Commission closed the file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analyses, which more fully explain the Commission's findings, are enclosed.

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

Sincerely,

Peter G. Blumberg
Assistant General Counsel

Enclosures
Factual and Legal Analyses

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: John McCain 2008, Inc. MUR: 6023
and Joseph Schmuckler,
in his official capacity as treasurer

I. INTRODUCTION

This matter is based upon a complaint filed with the Federal Election Commission ("the Commission") by David Donnelly, *see* 2 U.S.C. § 437g(a)(1), alleging that John McCain 2008, Inc. and Joseph Schmuckler, in his official capacity as treasurer, ("McCain Committee") may have received an excessive in-kind contribution from a lobbying firm and a prohibited corporate contribution from an Internet consulting firm.¹ The complaint alleges that The Loeffler Group, LLP ("LG") made payments to Susan Nelson, a former lobbyist who left LG to become the McCain Committee's Finance Director, which amounted to undisclosed excessive in-kind contributions to the McCain campaign. The complaint also alleges that 3eDC, LLC ("3eDC"), an Internet consulting company partly owned by Rick Davis, McCain's campaign manager, made a prohibited corporate contribution to the McCain campaign when it reduced the campaign's debt to 3eDC by over \$100,000.

Based upon the available information, including written responses from the respondents denying the allegations, there is no information to indicate that the respondents may have committed the violations alleged in the complaint. Accordingly, the Commission finds no reason to believe that John McCain 2008, Inc. and Joseph Schmuckler, in his official capacity as

¹ The complaint was based on information from a press report discussing lobbyist ties to the McCain campaign. Complaint at 1; Michael Isikoff, *McCain vs. Lobbyists*, NEWSWEEK, May 26, 2008, at 6.

1 treasurer, violated the Federal Election Campaign Act of 1971, as amended ("the Act"), in
2 connection with the allegations in this matter.

3 **II. FACTUAL AND LEGAL ANALYSIS**

4 **A. THE LOEFFLER GROUP, LLP**

5 **1. Factual Background**

6 Susan Nelson worked as a lobbyist for LG from August 2005 through July 2007, when
7 she left to work full time as the Finance Director for the McCain campaign. *See* McCain
8 Committee Response to Complaint ("McCain Response") at 1; Tory Newmyer & Kate Ackley, *K*
9 *Street Files*, ROLL CALL, July 13, 2005. After she left LG, she continued to receive monthly
10 payments from the firm in the amount of \$15,000 until April 2008. Isikoff, *supra* note 1, at 6.
11 The complaint claims that the payments for alleged part-time consulting services "dwarfed
12 [Nelson's] approximately \$6,300 monthly salary" for full-time work with the McCain
13 committee. Complaint at 3. As such, the complaint questions whether LG actually made
14 excessive in-kind contributions to the McCain campaign by paying such a large salary to Nelson
15 for part-time work and whether Nelson, in fact, did any work for LG during this period.

16 According to information obtained by the Commission, from August through December
17 2007, LG's payments to Susan Nelson consisted of severance payments that were part of a
18 severance agreement entered into with Nelson when she left the firm. That information indicates
19 that these payments were commercially reasonable, as well as consistent with and pursuant to
20 LG's pre-existing severance policy and practices. It appears that the severance payments were
21 less than her previous full-time salary and "on terms in the ordinary course of [LG's] business"
22 from August through December 2007. However, the amount of the monthly payments to Nelson
23 or Nelson's previous full-time salary have not been verified. Based on information obtained by

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1 the Commission, it appears that during this time period, Nelson provided advisory services
2 directly to LG Chairman, Tom Loeffler and that he and Nelson may have had over 100
3 conversations regarding firm matters during that time.

4 After the severance period ended in December 2007, LG entered into a consulting
5 arrangement with Nelson for part-time work for which payments began in January 2008 in the
6 same amount as the severance payments. Information obtained by the Commission shows that
7 LG wanted to continue to consult with Nelson on various firm matters during this time, and
8 because the work would be similar to the work she performed during the severance period, the
9 parties agreed to payments in the same amount.

10 The McCain campaign states in its response that it was aware of both LG's 2007
11 severance package and the 2008 consulting agreement with Nelson, and that it had no objection
12 to Nelson working with LG on an "occasional basis provided that it did not interfere with any of
13 her work for the Campaign." McCain Response at 1-2. The McCain Committee explains that it
14 operated under the understanding that the payments were commercially reasonable and pursuant
15 to LG's policies. *Id.* at 1. The campaign instructed LG that any salary payments that Nelson
16 received from the firm pursuant to the 2008 consulting agreement "would have to be the usual
17 and normal rate paid for such work in order to comply with federal election law and
18 regulations," and the campaign reviewed the consulting agreement between Nelson and LG to
19 ensure that it addressed these concerns. *Id.* at 2. The McCain Committee, however, has not
20 provided a copy of this agreement to the Commission.

21 The arrangement between Nelson and LG ended in May 2008 when the McCain
22 campaign instituted a conflict of interest policy applicable to lobbyists that prohibited campaign
23 employees from being registered lobbyists. *Id.* at 2 and Exhibit A. As a result of the McCain

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Committee's new policy, Nelson left LG to work exclusively for the campaign, and LG de-listed her as a lobbyist in its 2007 Year End Reports filed pursuant to the Lobbying Disclosure Act of 1995. *Id.* at 4; *see* Loeffler Group's 2007 Year End Lobbying Reports, dated Feb. 14, 2008, available at http://www.senate.gov/legislative/Public_Disclosure/LDA_reports.htm.

2. Legal Analysis

The Act prohibits contributions to a candidate or authorized committee in excess of \$2,300 in connection with federal elections. 2 U.S.C. § 441a. The term "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A). LG is a limited liability partnership, and, as such, its contributions are permissible, subject to a \$2,300 contribution limit. 11 C.F.R. § 110.1 (b)(1) and (e). A contribution by a partnership is attributed to the partnership and to each partner "[i]n direct proportion to his or her share of the partnership profits" or according to the partners' profit-sharing agreement as long as "[o]nly the profits of the partners to whom the contribution is attributed are reduced (or losses increased)" and "[t]hese partners' profits are reduced (or losses increased) in proportion to the contribution attributed to each of them." *Id.* There are five partners listed on the firm's website, and four donated the maximum \$2,300 to McCain's primary election campaign.²

In the context of employment-related compensation, Commission regulations provide that payments from a third party to a candidate shall be considered a contribution unless the "compensation results from *bona fide* employment that is genuinely independent of the candidacy," "is exclusively in consideration of services provided by the employee as part of this employment," and "the compensation does not exceed the amount of compensation which would

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1 be paid to any other similarly qualified person for the same work over the same time period.”
2 See 11 C.F.R. § 113.1(g)(6)(iii). While this regulation applies to payments made to a candidate,
3 the provision nevertheless aids in the analysis of the payments made to Susan Nelson as it sets
4 forth standards by which to analyze compensation by third parties to highly-placed campaign
5 employees to determine whether the compensation results in a contribution to the campaign.

6 The Commission has, in past enforcement matters, determined that compensation did not
7 result in a contribution where the information available was consistent with the respondents'
8 contentions that the arrangements were for *bona fide* services performed, independent of the
9 candidacy, and did not exceed the compensation paid to similarly qualified persons. At the
10 reason to believe stage, the Commission has examined the complaint and responses, alongside
11 any publicly available information, in making this determination. For example, in MUR 5260
12 (Talent for Senate), the Commission found no reason to believe that violations occurred as result
13 of payments from a law firm and university to a candidate, where the information provided by
14 Respondents indicated that the payments were for *bona fide* employment, the candidate's high
15 public profile played a role in determining the amount of his compensation, there was no
16 indication to suggest that the compensation was for anything other than *bona fide* services, and
17 the evidence showed that compensation paid to Talent was comparable to compensation paid to
18 similarly qualified persons for the same work over the same period of time. MUR 5260, First
19 General Counsel's Report, dated December 19, 2002, at 16-23. In that matter, the Commission
20 noted that there was “an absence of any evidence tending to show that Arent Fox and Talent
21 entered into their arrangement with the intent to subsidize Talent's

² Commission records indicate that LG partners Michael P. Daniels, Robert H. Finney, Tom Loeffler, and Hans C. Rickhoff each contributed \$2,300 to the McCain Committee for the primary election.

Senate campaign or exploratory efforts.” *Id.* at 23.

Other matters review have required investigations into the criteria set forth in 11 C.F.R. § 113.1. In MUR 5014 (Jeff Flake for Congress), the Commission investigated whether payments made to a federal candidate by a non-profit organization were prohibited or excessive contributions under the Act. At the reason to believe stage, the available information raised questions about the amount of work the candidate performed, whether the amount of compensation paid to the candidate was commensurate with his work and whether it was comparable with what would be paid to another similarly qualified person, why the timing of the consulting agreement was to last only for the duration of the campaign, and whether the organization would have had sufficient funds to pay the candidate without a substantial donation made by the candidate’s campaign co-finance chairman at that time the candidate was hired. After the investigation, the Commission determined there was insufficient evidence in that matter to support the alleged violations. Instead, the evidence suggested that there was a *bona fide* consulting agreement between the parties, the salary payments were made to the candidate only for services he rendered, and the amount of the candidate’s compensation was commensurate with the amount paid to similarly qualified persons performing the same work. MUR 5014, General Counsel’s Report # 2, dated October 3, 2003, at 5-18.

Similarly, in MUR 5571 (Tanonaka for Congress), the Commission authorized an investigation when information available at the reason to believe stage suggested that the candidate’s receipt of a lump sum payment from Koa Companies was contrary to the terms of the consulting agreement and was paid at a time when his campaign committee’s financial position was poor; the candidate concealed his business relationship with Koa until after state and federal agencies initiated investigations into his campaign activities; and the candidate engaged in a

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1 pattern of hiding the sources of funds used to make his personal loans to his campaign,
2 suggesting knowing and willful violations of the Act. See Factual and Legal Analysis for Dalton
3 Tanonaka and Tanonaka for Congress. However, the Commission found, after an investigation,
4 that there was a consulting agreement between Tanonaka and the Koa Companies for *bona fide*
5 consulting services, the agreement was independent of Tanonaka's candidacy, and that
6 compensation Tanonaka received was in consideration for services he performed for the
7 company and commensurate with the amount of money that would be paid to any similarly
8 qualified person for the same work over the same period of time. See MUR 5571, General
9 Counsel's Report # 2, dated September 20, 2007; *c.f.*, MUR 5638 (Bill Abbott For Preserving
10 American Jobs) (the Commission found reason to believe and entered into conciliation
11 agreement with union where Respondents admitted that payments to the candidate were not for
12 *bona fide* employment, genuinely independent of the candidacy, in consideration for services
13 provided, or equivalent to what would be paid to similarly situated employees).

14 The complaint questions whether LG's payments to Nelson were for *bona fide*
15 employment or were intended solely to supplement her smaller salary with the McCain
16 campaign. If the latter is true, then the McCain Committee would have received an excessive
17 in-kind contribution from LG. 2 U.S.C. § 441a. The complaint also raises a legitimate concern
18 over whether Nelson could have simultaneously worked as the Finance Director for a
19 presidential campaign and provided consulting services to another employer. However, the
20 response from the McCain Committee and other available information rebut these allegations,
21 and the Commission has found no information in the public record to contradict assertions that
22 Nelson did perform work for LG during the time period in question. The information available
23 to the Commission verifies that the payments to Nelson were for work she performed for the

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1 firm, that payments made to Nelson from August through December 2007 were part of a
2 severance package, and from January through April 2008, the payments were compensation for
3 her *bona fide* consulting services. The Commission, however, has not been provided with any
4 examples of projects on which Nelson consulted during this time. The McCain Committee also
5 indicates that it reviewed LG's consulting agreement with Nelson, and it relied on "express
6 statements" by LG that both the severance and consulting agreements with Nelson were
7 "consistent with and pursuant to [LG's] pre-existing severance policy and practices . . . in the
8 usual and ordinary course of LG's business and at commercially reasonable terms." McCain
9 Response at 2. Thus, there is no information to suggest that LG's payments to Nelson were not
10 for actual services she performed for the firm.

11 The complaint also draws attention to the size of the monthly payments LG made to
12 Nelson (\$15,000) compared with Nelson's monthly salary with the McCain campaign (\$6,300).
13 This fact alone does not suggest that LG's payments were not for *bona fide* consulting services
14 or in an amount greater than what would be paid to a similarly qualified individual for the same
15 type of work. In fact, it is not unusual for compensation in the private sector to be substantially
16 greater than payments made to campaign staff members. In the context of advisory opinion
17 requests, the Commission has permitted compensation plans that are tied to factors other than
18 billable hours, such as seniority, the ability to attract clients, and other skills. For instance, in
19 Advisory Opinion 2004-08 (*American Sugar Cane League*), the Commission found there was no
20 prohibited contribution where a corporation's severance package to a candidate was tied to past
21 employment services, based on objective considerations, and comparable to those packages
22 offered to similarly qualified employees. *See also* Advisory Opinion 2006-13 (*Spivack*)
23 (compensation paid to candidate did not constitute a contribution as long as it was in accordance

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1 with the firm's established compensation plan); Advisory Opinion 2004-17 (Klein)
2 (compensation for consulting services actually rendered was not a contribution if it satisfied
3 criteria in 11 C.F.R. § 113.1(g)); Advisory Opinion 1979-74 (Emerson) (compensation for
4 services that is comparable to amount paid to other similarly qualified persons for the same work
5 over the same period would not be a contribution). However, the Commission has been clear
6 over the years that where compensation is tied to billable hours, a contribution results when the
7 candidate's compensation is not reduced to reflect the actual hours worked. *See, e.g.*, Advisory
8 Opinion 2000-1 (Taveras); Advisory Opinion 1980-115 (O'Donnell); Advisory Opinion 1978-06
9 (Garr).

10 While there is no information about the salaries that other similarly qualified persons
11 would have received for the same work, 11 C.F.R. § 113.1(g)(6)(iii)(C), the available
12 information indicates how Tom Loeffler determined Nelson's salary payments for this time
13 period. It seems that Nelson's compensation was not tied to billable hours, but rather "on the
14 basis of [Loeffler's] 30 years experience as an employer with knowledge of the marketplace and
15 the true value of a person's professional services," and included factors such as seniority and
16 status within the firm, Nelson's ability to attract and retain clients, her skills, and her "value to
17 [LG] as an around-the-clock advisor." The information also shows that LG's severance
18 agreement was made in accordance with the firm's past practices, in the firm's "ordinary course
19 of business on terms substantially similar to those offered other employees in recognition of
20 bona fide work," and did not exceed an amount given to others in similar situations.

21 Although the available information indicates that Nelson's monthly payments during this
22 time period were less than her monthly salary when she worked full time for the firm, no
23 information has been provided to specify the amount of those monthly payments or Nelson's

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1 previous salary. Although the Lobbying Disclosure Act of 1995 requires lobbying firms to
2 register their lobbyists and report the firm's income and expenditures, the firm is not required to
3 report individual lobbyists' salaries. According to news reports, however, lobbyists' salaries for
4 well-connected staff can start as high as \$300,000 a year. See Jeffrey H. Birnbaum, *The Road to*
5 *Riches is Called K Street*, WASH. POST, June 22, 2005, at A01. Previously, Nelson had been a
6 Principal at the firm, and had many years of professional fundraising and government affairs
7 consulting experience at the firm and previously with other organizations. According to
8 information obtained by the Commission, Loeffler relied heavily on Nelson during the time
9 period in question because three other "key personnel" had recently left the firm.

10 There is no information available to demonstrate that LG's payments to Nelson from
11 August 2007 through April 2008 were inappropriate. The information available to the
12 Commission indicates that the payments were tied to Nelson's consulting services actually
13 rendered to LG, that LG had a past business practice of offering severance packages to departing
14 employees, that it followed such practice in offering Nelson a severance package, that Nelson's
15 payments were tied to factors other than billable hours, and that they were less than her prior
16 full-time salary. 11 C.F.R. § 113.1(g)(6)(iii). The complaint fails to provide any specific
17 information that would contradict these assertions.

18 Even though the McCain Committee's response appears to rebut the speculative
19 allegations in the complaint, some questions remain regarding how much work Nelson actually
20 performed for the firm. The Commission obtained general information that Nelson's
21 compensation did not exceed the amount that would have been given to others in a similar
22 situation, but has no specific examples in support. In similar cases, the Commission has weighed
23 the information in the complaint and responses when determining whether to proceed with an

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1 investigation. In MUR 5736 (Friends for Mike McGavick), for instance, the Commission found
2 that while the responses to the complaint were not factually complete, the complaint, which
3 alleged that the candidate's employer altered the terms of his employment agreement that in turn
4 resulted in lucrative benefits for the candidate, failed to provide sufficient facts to warrant an
5 investigation. See MUR 5736, First General Counsel's Report dated Nov. 22, 2006. In that
6 matter, the Respondents explained that the candidate's employment agreement was converted to
7 a severance package in the ordinary course of business and included payments for services
8 McGavick was to provide during the company's transition to a new CEO. *Id.* at 3-5. Moreover,
9 there was no information available to indicate that McGavick did not perform *bona fide* work for
10 the corporation during the transition or that he was paid more than other departing executives.
11 *Id.* at 10; see also, MUR 5701 (Bob Filner for Congress), First General Counsel's Report, dated
12 July 10, 2006, at 5 (finding allegations and available information did not warrant an investigation
13 where the respondent provided "sufficient and specific facts to rebut the complainant's
14 allegations" that a business run by the candidate's spouse was a "sham"). In the *Filner* matter,
15 there was also no information presented to contradict the Respondents' contentions that *bona*
16 *fide* services were provided to the campaign committee and that the company was paid fair
17 market value for the work. *Id.*

18 Similarly, while the response from the McCain Committee in this matter does not provide
19 substantial details regarding the arrangements with Nelson, the allegations in the complaint lack
20 sufficient facts to contradict the representations made in the McCain Committee's response and
21 other available information. See Statement of Reasons of Commissioners David M. Mason, Karl
22 J. Sandstrom, Bradley A. Smith and Scott E. Thomas in MUR 4960 (Hillary Rodham Clinton for
23 US Senate Exploratory Committee), issued December 21, 2000 (stating that "a complaint may be

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1 dismissed if it consists of factual allegations that are refuted with sufficiently compelling
2 evidence provided in the response to the complaint").

3 Accordingly, the Commission finds no reason to believe that John McCain 2008, Inc. and
4 Joseph Schmuckler, in his official capacity as treasurer violated 2 U.S.C. § 441a in connection
5 with the allegations relating to payments that LG made to Nelson.

6 **B. 3EDC, LLC**

7 **1. Factual Background**

8 The McCain campaign hired 3eDC, a company partly owned by McCain campaign
9 manager Rick Davis, to develop and maintain the campaign's website. 3eDC provided those
10 services, which included website development, e-mail list building, social networking tools, and
11 database management from January through May 2007. The complaint alleges that 3eDC
12 reduced its bill for Web services provided to the McCain campaign by \$107,475 at a time when
13 the campaign was struggling financially and attempting to cut costs, resulting in a prohibited
14 corporate contribution under 2 U.S.C. § 441b and 11 C.F.R. § 100.55. The complaint refers to
15 public statements by the McCain campaign that there were billing errors and that the bill was
16 renegotiated. However, the complaint questions how "a campaign manager can renegotiate a
17 contract with a firm that he partly owns without at least the appearance that he has used his
18 influence with both parties to reduce the debt." Complaint at 6.

19 A number of press articles report that Rick Davis arranged for the campaign's initial
20 service contract with the vendor, 3eDC, and that the contract with 3eDC "initially brought
21 objections from top [McCain] advisers," with some individuals accusing Davis of "self-dealing."
22 Michael Cooper, *Savior or Machiavelli - McCain's Top Aide Carries On*, N.Y. TIMES, Oct. 23,
23 2007, at A26; Matthew Mosk, *Top McCain Adviser has Found Success Mixing Money, Politics*,

29044244385

1 WASHINGTON POST, June 26, 2008, at A01. However, the McCain Committee claims that Davis
2 was not involved in negotiating the initial contract or in any other discussions concerning 3eDC.
3 Information obtained by the Commission indicates that Davis was “only a passive investor in
4 3eDC,” and not involved in the day-to-day operations. The McCain Committee also states that
5 Davis recused himself from any involvement with 3eDC while working for the McCain
6 campaign. McCain Response at 1 and Attachment A, ¶ 4. There is conflicting publicly available
7 information, however, on whether Davis disclosed his financial interest in 3eDC to McCain early
8 in the campaign. Cooper, *supra* at A26; Edward T. Pound, *Troublesome Resumes*, U.S. NEWS &
9 WORLD REPORT, May 28, 2007, at 50.

10 The McCain Committee’s response and other available information explain that there
11 was a legitimate dispute regarding the amount the campaign owed to 3eDC. 3eDC and the
12 McCain campaign entered into a contract for services on January 26, 2007. The contract details
13 3eDC’s fee structure for its services to the McCain Committee, including base fees, hourly rates
14 for additional work, and administrative fees. In May 2007, 3eDC decided to invoke the
15 contract’s termination clause because the campaign had failed to pay two outstanding invoices
16 when they were due, which 3eDC considered to be a material breach of the agreement. Initially,
17 3eDC sent a letter, dated May 11, 2007, to the McCain Committee requesting that it pay
18 \$164,138.21, the total owed on those invoices, in order to cure the material breach. The parties
19 discussed the matter and decided to terminate the service agreement. They entered into a
20 Termination Agreement and Release (“Termination Agreement”), dated May 18, 2007, that
21 required payment of the overdue invoices totaling \$164,138.21, required 3eDC to deliver a Final
22 Statement of unpaid services to the campaign by May 25, 2007, included a provision providing
23 for accrual of 1% interest per month for amounts that were past due, and required the campaign

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1 to make full payment, plus interest, within 60 days of receipt of the Final Statement. The
2 Termination Agreement estimated that the remaining invoices to be included in the Final
3 Statement totaled approximately \$725,000. The McCain campaign paid \$164,138.21 upon
4 execution of the agreement on May 18, 2007.

5 According to the McCain Committee, 3eDC never delivered a "Final Statement" to the
6 campaign, but instead "revised and confirmed the existing pending invoices." See McCain
7 Response at Attachment B, page 4. Nevertheless, before the sixty-day deadline, the McCain
8 Committee sent a letter dated July 16, 2007, invoking an "Audit" provision from the Services
9 and License Agreement that allowed the campaign to conduct a review and analysis of the
10 vendor's records supporting the fees and expenses invoiced by 3eDC. McCain Response at 1
11 and Attachment 6 (Letter to 3eDC). The McCain Committee explains that it also began its
12 review in response to news reports alleging that Rick Davis personally benefitted from the
13 committee's contract with 3eDC. *Id.* at Attachment A, ¶¶ 2-3.

14 Upon completing its review, the McCain Committee submitted a seven-page summary to
15 3eDC, dated September 10, 2007, that proposed adjustments for fees that it believed were in
16 error or where it believed there was insufficient documentation to support the expenses, and
17 proposed to pay a total of \$585,001.83 to settle the debt. The McCain Committee's letter
18 provides a detailed account of the disputed invoice amounts. The McCain Committee has also
19 provided to the Commission a copy of its internal written summary of its 3eDC account.
20 McCain Committee at Attachment B. Specifically, the Committee proposed a reduction in
21 3eDC's hosting charges by \$22,022.42; in Internet advertising by \$42,341.34; and website
22 content and development by \$63,119.24. *Id.* During the course of its review, the campaign also

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1 identified adjustments in 3eDC's favor, which it credited to 3eDC. *Id.* at 1-2. In total, the
2 McCain Committee proposed a reduction of approximately \$127,483.

3 Available information indicates that while 3eDC did not agree with all of the
4 adjustments, it believed that the proposal was commercially reasonable and agreed to accept the
5 committee's proposal, subject to some additional terms. McCain Response at Attachment C.
6 Those terms included required interest payments of 6% a year, monthly installments, a payment
7 schedule, late fees of 1% per month, an acceleration clause if the campaign ceased operating
8 before December 1, 2008, and required that the McCain Committee not seek reimbursement for
9 the cost of its audit. 3eDC believed that accepting the campaign's proposal, along with the
10 additional terms, was commercially reasonable and the best course of action to "resolve the
11 matter in order to get paid." According to information obtained by the Commission, 3eDC
12 balanced the costs of potential litigation, which would also result in more time passing without
13 receiving payments from the campaign, compared with the relatively small amount involved.
14 Based on those considerations, settling the matter at the reduced amount proposed made the most
15 "financial sense." Ultimately in September 2007, both parties agreed to these terms, which
16 required 15 monthly payments that would end on December 25, 2008. McCain Response at 2.
17 According to the McCain Committee, all required monthly payments were made to 3eDC
18 pursuant to the parties' negotiated resolution, and the full amount was paid several months early.
19 McCain Response at Attachment A, ¶ 8.

20 **2. Legal Analysis**

21 The Act prohibits corporations from making contributions in connection with federal
22 elections. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b)(1). As a limited liability company, 3eDC
23 may be subject to the prohibition against corporate contributions, depending on whether it elects

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1 to be treated as a partnership or corporation by the Internal Revenue Service. 11 C.F.R.
2 § 110.1(g). If treated as a partnership, it is possible that 3eDC made an excessive in-kind
3 contribution to the McCain Committee in violation of 2 U.S.C. § 441a when it reduced the
4 committee's debt as that reduction was well in excess of the maximum contribution of \$2,300
5 per partner as allowed by law. 11 C.F.R. § 110.1(e). If 3eDC elected tax treatment as a
6 corporation, it may have made a corporate contribution in violation of 2 U.S.C. § 441b(a) if its
7 agreement with the McCain Committee was not commercially reasonable. Information
8 regarding 3eDC's tax election is not publicly available. Therefore, it is unclear whether 3eDC is
9 subject to the prohibition against corporate contributions or the contribution limits applicable to
10 partnerships. 11 C.F.R. § 110.1(g). Nonetheless, it is not necessary to investigate 3eDC's tax
11 status because the Commission concludes that the agreement was commercially reasonable and
12 thus, there is no reason to believe there is a violation of either section 441a or 441b, as explained
13 below.

14 The allegations in the complaint raise the question whether 3eDC's reduction of its bill of
15 services to the McCain Committee by \$127,483 was commercially reasonable. Commission
16 regulations provide that a commercial vendor may forgive or settle a debt for less than the full
17 amount owed or may resolve a disputed debt, if it has treated the debt in a commercially
18 reasonable manner and complied with the regulatory requirements in 11 C.F.R. §§ 116.4 and
19 116.10. "Commercial vendor" is defined as "any persons providing goods or services to a
20 candidate or political committee whose usual and normal business involves the sale, rental, lease,
21 or provision of those services." 11 C.F.R. § 116.1(c). For unincorporated vendors, such as
22 3eDC, the amount forgiven is not considered a contribution if the commercial vendor has treated
23 the debt in a commercially reasonable manner and satisfied the relevant requirements of

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1 11 C.F.R. § 116.7 or 116.8. *Id.* at 116.4(a). A vendor can demonstrate that it has treated a debt
2 in a commercially reasonable manner by showing that: (1) the original extension of credit was
3 proper pursuant to 11 C.F.R. § 116.3; (2) the committee has undertaken all reasonable efforts to
4 satisfy the outstanding debt, such as engaging in additional fundraising, reducing overhead and
5 administrative costs, or liquidating assets; and (3) that the vendor has pursued its remedies as
6 vigorously as it would pursue its remedies against a similarly situated non-political debtor, *i.e.*,
7 that it has made oral and written requests for payment, withheld delivery of goods or services
8 until overdue debts are satisfied, imposed additional charges for late payment, referred the debt
9 to a collection service, or litigated for payment on the debt. 11 C.F.R. § 116.4(d).

10 Ongoing committees may resolve disputed debts, but the parties must nevertheless treat a
11 disputed debt in a “commercially reasonable manner” in accordance with 11 C.F.R. § 116.4(a)
12 and (d). A disputed debt, defined as an actual or potential debt or obligation where there is a
13 *bona fide* disagreement between the creditor and the political committee as to the existence of
14 the debt or the amount owed, is not subject to the debt settlement requirements and procedures
15 set forth in 11 C.F.R. §§ 116.7 and 116.8. *See* 11 C.F.R. §§ 116.1(d) and 116.7(c)(2).

16 Commission regulations also state that a commercial vendor may extend credit to a
17 candidate or political committee, provided that the extension of credit is in the ordinary course of
18 the vendor's business practices and that the terms of the credit are substantially similar to
19 extensions of credit to non-political entities, and they further provide that an extension of credit
20 includes agreements between a vendor and political committee providing additional time to pay
21 an amount due or the failure of the committee to make full payment by the previously agreed
22 upon due date. 11 C.F.R. §§ 116.1(e) and 116.3(a).

29044244390

1 Here, the complaint questions the circumstances surrounding the negotiation of the debt
2 the McCain Committee owed to 3eDC. Both 3eDC and the McCain Committee assert that they
3 had a *bona fide* dispute regarding the amount that the campaign owed and add that the reduction
4 that was ultimately negotiated was commercially reasonable. As discussed below, there is no
5 information to contradict those contentions.

6 First, there is no information to indicate that the original service contract between 3eDC
7 and the campaign, or that their negotiations concerning the amount owed by the campaign, was
8 not proper pursuant 11 C.F.R. § 116.3(c). *See* 11 C.F.R. § 116.4(d)(1). The complaint provides
9 no information to demonstrate that 3eDC deviated from its established procedures and past
10 practices in any of its arrangements with the campaign. *Id.* at § 116.3(c)(1). While there is no
11 specific information to demonstrate that 3eDC's actions in re-negotiating the fees with the
12 Committee followed the company's established procedures, whether the transaction "conformed
13 to the usual and normal practice in the commercial vendor's trade or industry," or if it was on the
14 same terms as those provided to non-political clients, as required by 11 C.F.R. § 116.3(c)(1)-(3),
15 the McCain Committee has provided the Commission with substantial documentation to show
16 that it negotiated a reasonable resolution of a commercial dispute with 3eDC. As part of the
17 response to the complaint, the Committee provided thorough documentation regarding the initial
18 service contract, correspondence with each other concerning termination of the contract and
19 negotiation of the debt, and included a sworn affidavit describing the circumstances behind the
20 negotiations. In addition, the McCain Committee provided lengthy documentation containing
21 the results of its line item review of its account with 3eDC. *See* McCain Response at Attachment
22 B (providing fifteen-page redacted internal memorandum to Commission). Further, the
23 documentation demonstrates that the McCain Committee and 3eDC followed procedures

29044244391

1 established in those agreements in order to terminate the contract, review invoices, and resolve
2 disputed amounts due.

3 Second, the McCain Committee's efforts to satisfy the outstanding debt were reasonable.
4 11 C.F.R. § 116.4(d)(2). As part of its efforts to resolve the outstanding debt, the McCain
5 Committee invoked the "Audit" provision from the Services and License Agreement, before the
6 sixty-day deadline for payment of the final invoices totaling approximately \$725,000, and
7 completed a review of 3eDC's records pertaining to the Committee's account that led to the
8 eventual reduction of the 3eDC's bill to the Committee. Although section 116.4(d)(2) lists other
9 efforts that can indicate reasonableness, such as engaging in further fundraising efforts, the
10 regulation states that the examples set forth therein are not an exhaustive list. In this matter, the
11 Committee's prompt and thorough review of 3eDC's records suggests that the McCain
12 Committee took reasonable steps to ascertain the correct amount due to the vendor and then paid
13 the amount ahead of schedule. The Committee's actions in accepting the additional terms
14 proposed by 3eDC to settle the debt also support this conclusion.

15 Although section 116.4(d)(2) requires that a committee undertake all reasonable efforts to
16 satisfy the outstanding debt, the McCain Committee did not admit that anything more than
17 \$585,001.83 was due on the contract, and it paid that amount. 3eDC may not have initially
18 agreed with that figure, but it accepted the results of the McCain Committee's audit. Thus, the
19 requirement that the McCain Committee use "all" reasonable efforts is satisfied in this case.

20 Finally, the information available supports a finding that 3eDC pursued its remedies as
21 vigorously as it would pursue its remedies against a nonpolitical debtor in similar circumstances.
22 11 C.F.R. § 116.4(d)(3). In response to the McCain Committee's failure to pay two invoices,
23 3eDC sought to terminate the service contract and sent a written request for payment. *Id.* at

29044244392

§ 116.4(d)(3)(i). In addition, upon receipt of the McCain Committee's written summary proposing adjustments to 3eDC's fees, 3eDC proposed additional terms including interest payments, a payment schedule and late fees. *Id.* at § 116.4(d)(3)(iii). While 3eDC chose not to pursue litigation or refer the McCain Committee's debt to a debt collection service as suggested in the non-exhaustive list found in the Commission's regulations, it appears that the cost of litigation was one of 3eDC's considerations in deciding to settle the matter for the amount proposed by the campaign. 11 C.F.R. § 116.4(d)(3)(iv) and (v). 3eDC's business decision to settle the Committee's debt for the bulk of the amount owed, plus interest payments and late fees, rather than spend additional funds in hopes of obtaining an amount closer to \$725,000, does not appear unreasonable.

Thus, the documentation available to the Commission lends support to the contention that the reduction of the McCain Committee's bill was done in a commercially reasonable manner. As discussed above, the documentation also accounts for the time that passed between the termination of the service contract and the campaign's payment of the amount owed to 3eDC. In past cases in which the Commission determined that in-kind contributions resulted, the cases involved long delays in payment that did not appear commercially reasonable. *See* MUR 5396 (Bauer for President 2000) (respondents entered into conciliation agreement to resolve, *inter alia*, 441a and 441b violations resulting from extensions of credit from three different vendors totaling over \$700,000 and owed for periods between 105 to 235 days); MUR 5047 (Clinton/Gore '96) (the Commission found reason to believe that the committee and two of its vendors violated section 441b by accepting or making illegal corporate extensions of credit totaling over \$900,000 that were unresolved for four months or longer, but took no further action because the debts had been paid in full and some debt collection activity had occurred).

1 In this matter, the McCain Committee and 3eDC negotiated a termination agreement
2 within 7 days of 3eDC's notification of the campaign's material breach of the contract. The
3 Committee's audit of 3eDC's records then lasted almost two months, from July to September
4 2007. However, upon completion of the audit, the campaign sent a detailed summary to 3eDC
5 proposing adjustments in the invoices, and within a few days, the parties negotiated a final
6 agreement for payment of the remaining amount due to 3eDC, that included a payment schedule,
7 interest payments and late fees. The campaign immediately started the required payments in
8 October 2007 and paid the debt off early.

9 Because the dispute over the amount owed was resolved over the course of two months,
10 between the deadlines for the 2007 July and October Quarterly Reports, the McCain Committee
11 was not required to report the debt owed to 3eDC as a "disputed debt." 11 C.F.R. § 116.10. It
12 appears that the McCain Committee properly reported its debt owed to 3eDC in its reports filed
13 with the Commission, by reporting the amount of the debt it ultimately agreed on with 3eDC.
14 2 U.S.C. § 434(b)(8).

15 Accordingly, the Commission finds no reason to believe that John McCain 2008, Inc. and
16 Joseph Schmuckler, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b), 441a or
17 441b.

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: The Loeffler Group, LLP MUR: 6023
Susan Nelson

I. INTRODUCTION

This matter is based upon a complaint filed with the Federal Election Commission ("the Commission") by David Donnelly, *see* 2 U.S.C. § 437g(a)(1), alleging that The Loeffler Group, LLP ("LG") made an excessive in-kind contribution to John McCain 2008, Inc. and Joseph Schmuckler, in his official capacity as treasurer ("McCain Committee").¹ The complaint alleges that LG made payments to Susan Nelson, a former lobbyist who left LG to become the McCain Committee's Finance Director, which amounted to undisclosed excessive in-kind contributions to the McCain campaign.

Based upon the available information, including a written response from LG denying the allegations, there is no information to indicate that the Respondents may have committed the violation alleged in the complaint. Accordingly, the Commission finds no reason to believe that The Loeffler Group and Susan Nelson violated the Federal Election Campaign Act of 1971, as amended ("the Act"), in connection with the allegations in this matter.

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

Susan Nelson worked as a lobbyist for LG from August 2005 through July 2007, when she left to work full time as the Finance Director for the McCain campaign. LG Response to

¹ The complaint was based on information from a press report discussing lobbyist ties to the McCain campaign. Complaint at 1; Michael Isikoff, *McCain vs. Lobbyists*, NEWSWEEK, May 26, 2008, at 6.

1 Complaint ("LG Response") at 1 and 3 and Aff. at ¶ 6; Tory Newmyer & Kate Ackley, *K Street*
2 *Files*, ROLL CALL, July 13, 2005. After she left LG, she continued to receive monthly payments
3 from the firm in the amount of \$15,000 until April 2008. Isikoff, *supra* note 1, at 6. The
4 complaint claims that the payments for alleged part-time consulting services "dwarfed [Nelson's]
5 approximately \$6,300 monthly salary" for full-time work with the McCain committee.
6 Complaint at 3. As such, the complaint questions whether LG actually made excessive in-kind
7 contributions to the McCain campaign by paying such a large salary to Nelson for part-time
8 work and whether Nelson, in fact, did any work for LG during this period.

9 LG responds that from August through December 2007, LG's payments to Susan Nelson
10 consisted of severance payments that were part of a severance agreement entered into with
11 Nelson when she left the firm. LG Response at 5. LG explains that these payments were
12 commercially reasonable, as well as consistent with and pursuant to LG's pre-existing severance
13 policy and practices. *Id.* at 5, 11-12, and Aff. at ¶ 6. According to LG, the severance payments
14 were less than Nelson's previous full-time salary and "on terms in the ordinary course of [LG's]
15 business" from August through December 2007. *Id.* at 5 and Aff. at ¶ 6. However, LG's
16 response does not verify the amount of the monthly payments to Nelson or Nelson's previous
17 full-time salary. LG Chairman, Tom Loeffler, attests that during this time period, Nelson
18 provided advisory services directly to him and that he and Nelson may have had over 100
19 conversations regarding firm matters during that time. LG Response at 5 and 8, and Aff. at ¶ 7.

20 After the severance period ended in December 2007, LG entered into a consulting
21 arrangement with Nelson for part-time work for which payments began in January 2008 in the
22 same amount as the severance payments. LG Response at 6 and Aff. at ¶ 10. According to LG,
23 the firm wanted to continue to consult with Nelson on various firm matters during this time, and

29044244396

1 because the work would be similar to the work she performed during the severance period, the
2 parties agreed to payments in the same amount. *Id.* at 6.

3 Information obtained by the Commission indicates that the McCain campaign was aware
4 of both LG's 2007 severance package and the 2008 consulting agreement with Nelson, and that
5 it had no objection to Nelson working with LG on an "occasional basis provided that it did not
6 interfere with any of her work for the Campaign." It appears that the McCain Committee
7 operated under the understanding that the payments were commercially reasonable and pursuant
8 to LG's policies. Available information indicates that the campaign instructed LG that any
9 salary payments that Nelson received from the firm pursuant to the 2008 consulting agreement
10 "would have to be the usual and normal rate paid for such work in order to comply with federal
11 election law and regulations," and the campaign reviewed the consulting agreement between
12 Nelson and LG to ensure that it addressed these concerns. Neither LG nor Nelson, however,
13 have provided a copy of this agreement to the Commission, and Nelson also did not file a
14 response to the complaint, even though she was notified of it.

15 The arrangement between Nelson and LG ended in May 2008 when the McCain
16 campaign instituted a conflict of interest policy applicable to lobbyists that prohibited campaign
17 employees from being registered lobbyists. As a result of the McCain Committee's new policy,
18 Nelson left LG to work exclusively for the campaign, and LG de-listed her as a lobbyist in its
19 2007 Year End Reports filed pursuant to the Lobbying Disclosure Act of 1995. *See Loeffler*
20 *Group's 2007 Year End Lobbying Reports, dated Feb. 14, 2008, available at*
21 http://www.senate.gov/legislative/Public_Disclosure/LDA_reports.htm.

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B. Legal Analysis

The Act prohibits contributions to a candidate or authorized committee in excess of \$2,300 in connection with federal elections. 2 U.S.C. § 441a. The term “contribution” includes “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(8)(A). LG is a limited liability partnership, and, as such, its contributions are permissible, subject to a \$2,300 contribution limit. 11 C.F.R. § 110.1 (b)(1) and (e). A contribution by a partnership is attributed to the partnership and to each partner “[i]n direct proportion to his or her share of the partnership profits” or according to the partners’ profit-sharing agreement as long as “[o]nly the profits of the partners to whom the contribution is attributed are reduced (or losses increased)” and “[t]hese partners’ profits are reduced (or losses increased) in proportion to the contribution attributed to each of them.” *Id.* There are five partners listed on the firm’s website, and four donated the maximum \$2,300 to McCain’s primary election campaign.²

In the context of employment-related compensation, Commission regulations provide that payments from a third party to a candidate shall be considered a contribution unless the “compensation results from *bona fide* employment that is genuinely independent of the candidacy,” “is exclusively in consideration of services provided by the employee as part of this employment,” and “the compensation does not exceed the amount of compensation which would be paid to any other similarly qualified person for the same work over the same time period.” See 11 C.F.R. § 113.1(g)(6)(iii). While this regulation applies to payments made to a candidate, the provision nevertheless aids in the analysis of the payments made to Susan Nelson as it sets

² Commission records indicate that LG partners Michael P. Daniels, Robert H. Finney, Tom Loeffler, and Hans C. Rickhoff each contributed \$2,300 to the McCain Committee for the primary election.

1 forth standards by which to analyze compensation by third parties to highly-placed campaign
2 employees to determine whether the compensation results in a contribution to the campaign.

3 The Commission has, in past enforcement matters, determined that compensation did not
4 result in a contribution where the information available was consistent with the respondents'
5 contentions that the arrangements were for *bona fide* services performed, independent of the
6 candidacy, and did not exceed the compensation paid to similarly qualified persons. At the
7 reason to believe stage, the Commission has examined the complaint and responses, alongside
8 any publicly available information, in making this determination. For example, in MUR 5260
9 (Talent for Senate), the Commission found no reason to believe that violations occurred as result
10 of payments from a law firm and university to a candidate, where the information provided by
11 Respondents indicated that the payments were for *bona fide* employment, the candidate's high
12 public profile played a role in determining the amount of his compensation, there was no
13 indication to suggest that the compensation was for anything other than *bona fide* services, and
14 the evidence showed that compensation paid to Talent was comparable to compensation paid to
15 similarly qualified persons for the same work over the same period of time. MUR 5260, First
16 General Counsel's Report, dated December 19, 2002, at 16-23. In that matter, the Commission
17 noted that there was "an absence of any evidence tending to show that Arent Fox and Talent
18 entered into their arrangement with the intent to subsidize Talent's Senate campaign or
19 exploratory efforts." *Id.* at 23.

20 Other matters have required investigations into the criteria set forth in 11 C.F.R. § 113.1.
21 In MUR 5014 (Jeff Flake for Congress), the Commission investigated whether payments made to
22 a federal candidate by a non-profit organization were prohibited or excessive contributions under
23 the Act. At the reason to believe stage, the available information raised questions about the

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1 amount of work the candidate performed, whether the amount of compensation paid to the
2 candidate was commensurate with his work and whether it was comparable with what would be
3 paid to another similarly qualified person, why the timing of the consulting agreement was to last
4 only for the duration of the campaign, and whether the organization would have had sufficient
5 funds to pay the candidate without a substantial donation made by the candidate's campaign co-
6 finance chairman at that time the candidate was hired. After the investigation, the Commission
7 determined there was insufficient evidence in that matter to support the alleged violations.
8 Instead, the evidence suggested that there was a *bona fide* consulting agreement between the
9 parties, the salary payments were made to the candidate only for services he rendered, and the
10 amount of the candidate's compensation was commensurate with the amount paid to similarly
11 qualified persons performing the same work. MUR 5014, General Counsel's Report # 2, dated
12 October 3, 2003, at 5-18.

13 Similarly, in MUR 5571 (Tanonaka for Congress), the Commission authorized an
14 investigation when information available at the reason to believe stage suggested that the
15 candidate's receipt of a lump sum payment from Koa Companies was contrary to the terms of the
16 consulting agreement and was paid at a time when his campaign committee's financial position
17 was poor; the candidate concealed his business relationship with Koa until after state and federal
18 agencies initiated investigations into his campaign activities; and the candidate engaged in a
19 pattern of hiding the sources of funds used to make his personal loans to his campaign,
20 suggesting knowing and willful violations of the Act. See Factual and Legal Analysis for Dalton
21 Tanonaka and Tanonaka for Congress. However, the Commission found, after an investigation,
22 that there was a consulting agreement between Tanonaka and the Koa Companies for *bona fide*
23 consulting services, the agreement was independent of Tanonaka's candidacy, and that

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1 compensation Tanonaka received was in consideration for services he performed for the
2 company and commensurate with the amount of money that would be paid to any similarly
3 qualified person for the same work over the same period of time. See MUR 5571, General
4 Counsel's Report # 2, dated September 20, 2007; *c.f.*, MUR 5638 (Bill Abbott For Preserving
5 American Jobs) (found reason to believe and entered into conciliation agreement with union
6 where Respondents admitted that payments to the candidate were not for *bona fide* employment,
7 genuinely independent of the candidacy, in consideration for services provided, or equivalent to
8 what would be paid to similarly situated employees).

9 The complaint questions whether LG's payments to Nelson were for *bona fide*
10 employment or were intended solely to supplement her smaller salary with the McCain
11 campaign. If the latter is true, then LG would have made excessive in-kind contributions to the
12 McCain Committee. 2 U.S.C. § 441a. The complaint also raises a legitimate concern over
13 whether Nelson could have simultaneously worked as the Finance Director for a presidential
14 campaign and provided consulting services to another employer. However, the response from
15 LG and other available information rebut these allegations, and the Commission has found no
16 information in the public record to contradict assertions that Nelson did perform work for LG
17 during the time period in question. LG's response verifies that the payments to Nelson were for
18 work she performed for the firm. In a sworn affidavit, LG Chairman Tom Loeffler explains that
19 payments made to Nelson from August through December 2007 were part of a severance
20 package, and from January through April 2008, the payments were compensation for her *bona*
21 *fide* consulting services. LG, however, does not provide any examples of projects on which
22 Nelson consulted during this time. The available information also indicates that the McCain
23 Committee reviewed LG's consulting agreement with Nelson, and it relied on "express

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statements" made by LG that both the severance and consulting agreements with Nelson were "consistent with and pursuant to [LG's] pre-existing severance policy and practices . . . in the usual and ordinary course of LG's business and at commercially reasonable terms." Thus, there is no information to suggest that LG's payments to Nelson were not for actual services she performed for the firm.

The complaint also draws attention to the size of the monthly payments LG made to Nelson (\$15,000) compared with Nelson's monthly salary with the McCain campaign (\$6,300). This fact alone does not suggest that LG's payments were not for *bona fide* consulting services or in an amount greater than what would be paid to a similarly qualified individual for the same type of work. In fact, it is not unusual for compensation in the private sector to be substantially greater than payments made to campaign staff members. In the context of advisory opinion requests, the Commission has permitted compensation plans that are tied to factors other than billable hours, such as seniority, the ability to attract clients, and other skills. For instance, in Advisory Opinion 2004-08 (American Sugar Cane League), the Commission found there was no prohibited contribution where a corporation's severance package to a candidate was tied to past employment services, based on objective considerations, and comparable to those packages offered to similarly qualified employees. *See also* Advisory Opinion 2006-13 (Spivack) (compensation paid to candidate did not constitute a contribution as long as it was in accordance with the firm's established compensation plan); Advisory Opinion 2004-17 (Klein) (compensation for consulting services actually rendered was not a contribution if it satisfied criteria in 11 C.F.R. § 113.1(g)); Advisory Opinion 1979-74 (Emerson) (compensation for services that is comparable to amount paid to other similarly qualified persons for the same work over the same period would not be a contribution). However, the Commission has been clear

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1 over the years that where compensation is tied to billable hours, a contribution results when the
2 candidate's compensation is not reduced to reflect the actual hours worked. *See, e.g.*, Advisory
3 Opinion 2000-1 (Taveras); Advisory Opinion 1980-115 (O'Donnell); Advisory Opinion 1978-06
4 (Garr).

5 While LG does not describe the salaries that other similarly qualified persons would have
6 received for the same work, 11 C.F.R. § 113.1(g)(6)(iii)(C), in his affidavit, Tom Loeffler does
7 explain how he determined Nelson's salary payments for this time period. He explains that
8 Nelson's compensation was not tied to billable hours, but rather "on the basis of [Loeffler's] 30
9 years experience as an employer with knowledge of the marketplace and the true value of a
10 person's professional services," and included factors such as seniority and status within the firm,
11 Nelson's ability to attract and retain clients, her skills, and her "value to [LG] as an around-the-
12 clock advisor." LG Response at 3 and Aff. at ¶ 3. LG also states that its severance agreement
13 was made in accordance with the firm's past practices, in the firm's "ordinary course of business
14 on terms substantially similar to those offered other employees in recognition of bona fide
15 work," and did not exceed an amount given to others in similar situations. *Id.* at 12 and Aff. at
16 ¶ 6.

17 Although LG indicates that Nelson's monthly payments during this time period were less
18 than her monthly salary when she worked full time for the firm, LG does not specify the amount
19 of those monthly payments or Nelson's previous salary. Further, although the Lobbying
20 Disclosure Act of 1995 requires lobbying firms to register their lobbyists and report the firm's
21 income and expenditures, the firm is not required to report individual lobbyists' salaries.
22 According to news reports, however, lobbyists' salaries for well-connected staff can start as high
23 as \$300,000 a year. *See* Jeffrey H. Birnbaum, *The Road to Riches is Called K Street*, WASH.

2904424403

1 POST, June 22, 2005, at A01. Previously, Nelson had been a Principal at the firm, and had many
2 years of professional fundraising and government affairs consulting experience at the firm and
3 previously with other organizations. LG Response at 3 and Aff. at ¶ 1. As further justification
4 for her salary payments, Loeffler also explains that he relied heavily on Nelson during the time
5 period in question because three other “key personnel” had recently left the firm. *Id.* at 5.

6 There is no information available to demonstrate that LG’s payments to Nelson from
7 August 2007 through April 2008 were inappropriate. LG contends that the payments were tied
8 to Nelson’s consulting services actually rendered to the firm, that it had a past business practice
9 of offering severance packages to departing employees, that it followed such practice in offering
10 Nelson a severance package, that Nelson’s payments were tied to factors other than billable
11 hours, and that they were less than her prior full-time salary. 11 C.F.R. § 113.1(g)(6)(iii). The
12 complaint fails to provide any specific information that would contradict these assertions.

13 Even though LG’s response appears to rebut the speculative allegations in the complaint,
14 some questions remain regarding how much work Nelson actually performed for the firm.
15 Although LG’s response makes general statements that Nelson’s compensation did not exceed
16 the amount that would have been given to others in a similar situation, the response fails to
17 provide any specific examples in support. In similar cases, the Commission has weighed the
18 information in the complaint and responses when determining whether to proceed with an
19 investigation. In MUR 5736 (Friends for Mike McGavick), for instance, the Commission found
20 that while the responses to the complaint were not factually complete, the complaint, which
21 alleged that the candidate’s employer altered the terms of his employment agreement that in turn
22 resulted in lucrative benefits for the candidate, failed to provide sufficient facts to warrant an
23 investigation. See MUR 5736, First General Counsel’s Report dated Nov. 22, 2006. In that

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1 matter, the Respondents explained that the candidate's employment agreement was converted to
2 a severance package in the ordinary course of business and included payments for services
3 McGavick was to provide during the company's transition to a new CEO. *Id.* at 3-5. Moreover,
4 there was no information available to indicate that McGavick did not perform *bona fide* work for
5 the corporation during the transition or that he was paid more than other departing executives.
6 *Id.* at 10; *see also*, MUR 5701(Bob Filner for Congress), First General Counsel's Report, dated
7 July 10, 2006, at 5 (finding allegations and available information did not warrant an investigation
8 where the respondent provided "sufficient and specific facts to rebut the complainant's
9 allegations" that a business run by the candidate's spouse was a "sham"). In the *Filner* matter,
10 there was also no information presented to contradict the Respondents' contentions that *bona*
11 *fide* services were provided to the campaign committee and that the company was paid fair
12 market value for the work. *Id.*

13 Similarly, while the response from LG in this matter does not provide substantial details
14 regarding the arrangements with Nelson, the allegations in the complaint lack sufficient facts to
15 contradict the representations made in LG's response. *See* Statement of Reasons of
16 Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas in
17 MUR 4960 (Hillary Rodham Clinton for US Senate Exploratory Committee), issued
18 December 21, 2000 (stating that "a complaint may be dismissed if it consists of factual
19 allegations that are refuted with sufficiently compelling evidence provided in the response to the
20 complaint"). Accordingly, the Commission finds no reason to believe that The Loeffler Group,
21 LLP violated 2 U.S.C. § 441a or that Susan Nelson violated the Act.

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4 **RESPONDENT: 3eDC, LLC**

MUR: 6023

5
6 **I. INTRODUCTION**

7
8 This matter is based upon a complaint filed with the Federal Election Commission ("the
9 Commission") by David Donnelly, *see* 2 U.S.C. § 437g(a)(1), alleging that 3eDC, LLC
10 ("3eDC"), an Internet consulting company partly owned by Rick Davis, John McCain's
11 campaign manager, made a prohibited corporate contribution to John McCain 2008, Inc. and
12 Joseph Schmuckler, in his official capacity as treasurer, ("McCain Committee") when it reduced
13 the campaign's debt to 3eDC by over \$100,000.

14 Based upon the available information, including a written response from the respondent
15 denying the allegations, there is no information to indicate that 3eDC may have committed the
16 violation alleged in the complaint. Accordingly, the Commission finds no reason to believe that
17 3eDC violated the Federal Election Campaign Act of 1971, as amended ("the Act"), in
18 connection with the allegations in this matter.

19 **II. FACTUAL AND LEGAL ANALYSIS**

20 **A. Factual Background**

21 The McCain campaign hired 3eDC to develop and maintain the campaign's website.
22 3eDC Response to Complaint ("3eDC Response") at 1. 3eDC provided those services, which
23 included website development, e-mail list building, social networking tools, and database
24 management from January through May 2007. *Id.* at 2-4. The complaint alleges that 3eDC
25 reduced its bill for Web services provided to the McCain campaign by \$107,475 at a time when

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1 the campaign was struggling financially and attempting to cut costs, resulting in a prohibited
2 corporate contribution under 2 U.S.C. § 441b and 11 C.F.R. § 100.55. The complaint refers to
3 public statements by the McCain campaign that there were billing errors and that the bill was
4 renegotiated. However, the complaint questions how “a campaign manager can renegotiate a
5 contract with a firm that he partly owns without at least the appearance that he has used his
6 influence with both parties to reduce the debt.” Complaint at 6.

7 A number of press articles report that Rick Davis arranged for the campaign’s initial
8 service contract with the vendor, 3eDC, and that the contract with 3eDC “initially brought
9 objections from top [McCain] advisers,” with some individuals accusing Davis of “self-dealing.”
10 Michael Cooper, *Savior or Machiavelli - McCain’s Top Aide Carries On*, N.Y. TIMES, Oct. 23,
11 2007, at A26; Matthew Mosk, *Top McCain Adviser has Found Success Mixing Money, Politics*,
12 WASHINGTON POST, June 26, 2008, at A01. However, 3eDC claims that Davis was not involved
13 in negotiating the initial contract or in any other discussions concerning 3eDC. See 3eDC
14 Response at 2 and Attachment 1. Information obtained by the Commission indicates that Davis
15 was “only a passive investor in 3eDC,” was not involved in its day-to-day operations, and that he
16 recused himself from any involvement with 3eDC while working for the McCain campaign.
17 There is conflicting publicly available information, however, on whether Davis disclosed his
18 financial interest in 3eDC to McCain early in the campaign. Cooper, *supra* at A26; Edward T.
19 Pound, *Troublesome Resumes*, U.S. NEWS & WORLD REPORT, May 28, 2007, at 50.

20 3eDC’s response explains that the parties had a legitimate dispute regarding the amount
21 the campaign owed to 3eDC. 3eDC and the McCain campaign entered into a contract for
22 services on January 26, 2007. 3eDC Response at 2-3 and Attachment 2 (Services and Licenses
23 Agreement). The contract details 3eDC’s fee structure for its services to the McCain Committee,

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including base fees, hourly rates for additional work, and administrative fees. 3eDC Response at 2-3 and Attachment 2, at 24. In May 2007, 3eDC decided to invoke the contract's termination clause because the campaign had failed to pay two outstanding invoices when they were due, which 3eDC considered to be a material breach of the agreement. 3eDC at 3 and Attachment 2, ¶ 9.2. Initially, 3eDC sent a letter, dated May 11, 2007, to the McCain Committee requesting that it pay \$164,138.21, the total owed on those invoices, in order to cure the material breach. *Id.* at Attachment 3. The parties discussed the matter and decided to terminate the service agreement. *Id.* at 3. They entered into a Termination Agreement and Release ("Termination Agreement"), dated May 18, 2007, that required payment of the overdue invoices totaling \$164,138.21, required 3eDC to deliver a Final Statement of unpaid services to the campaign by May 25, 2007, included a provision providing for accrual of 1% interest per month for amounts that were past due, and required the campaign to make full payment, plus interest, within 60 days of receipt of the Final Statement. 3eDC Response at 3 and Attachment 4. The Termination Agreement estimated that the remaining invoices to be included in the Final Statement totaled approximately \$725,000. *Id.* at Attachment 4, ¶ 1(b). The McCain campaign paid \$164,138.21 upon execution of the agreement on May 18, 2007.

According to information obtained by the Commission, 3eDC never delivered a "Final Statement" to the campaign, but instead "revised and confirmed the existing pending invoices." Nevertheless, before the sixty-day deadline, the McCain Committee sent a letter dated July 16, 2007, invoking an "audit" provision from the Services and License Agreement that allowed the campaign to conduct a review and analysis of the vendor's records supporting the fees and expenses invoiced by 3eDC. 3eDC Response at 4, Attachment 2, ¶ 3.6 and Attachment 3. The Commission's information indicates that the McCain Committee also began its review in

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1 response to news reports alleging that Rick Davis personally benefitted from the committee's
2 contract with 3eDC.

3 Upon completing its review, the McCain Committee submitted a seven-page summary to
4 3eDC, dated September 10, 2007, that proposed adjustments for fees that it believed were in
5 error or where it believed there was insufficient documentation to support the expenses, and
6 proposed to pay a total of \$585,001.83 to settle the debt. 3eDC Response at Attachment 6. The
7 McCain Committee's summary provides a detailed account of the disputed invoice amounts. *Id.*
8 Specifically, the Committee proposed a reduction in 3eDC's hosting charges by \$22,022.42; in
9 Internet advertising by \$42,341.34; and website content and development by \$63,119.24.
10 During the course of its review, the campaign also identified adjustments in 3eDC's favor, which
11 it credited to 3eDC. In total, the McCain Committee proposed a reduction of approximately
12 \$127,483.

13 According to Chief Executive Officer Scott Wilkinson, while 3eDC did not agree with all
14 of the adjustments, it believed that the proposal was commercially reasonable and agreed to
15 accept the committee's proposal, subject to some additional terms. 3eDC at 4 and Attachment 7.
16 Those terms included required interest payments of 6% a year, monthly installments, a payment
17 schedule, late fees of 1% per month, an acceleration clause if the campaign ceased operating
18 before December 1, 2008, and required that the McCain Committee not seek reimbursement for
19 the cost of its audit. 3eDC Response at 5 and Attachment 7. 3eDC believed that accepting the
20 campaign's proposal, along with the additional terms, was commercially reasonable and the best
21 course of action to "resolve the matter in order to get paid." *Id.* at 4. 3eDC explained that it
22 balanced the costs of potential litigation, which would also result in more time passing without
23 receiving payments from the campaign, compared with the "relatively small amount involved."

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Id. at 5. Based on those considerations, settling the matter at the reduced amount proposed made the most “financial sense.” *Id.* Ultimately in September 2007, both parties agreed to these terms, which required 15 monthly payments that would end on December 25, 2008. 3eDC Response at Attachment 7. According to information obtained by the Commission, all required monthly payments were made to 3eDC pursuant to the parties’ negotiated resolution, and the full amount was paid several months early.

B. Legal Analysis

The Act prohibits corporations from making contributions in connection with federal elections. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b)(1). As a limited liability company, 3eDC may be subject to the prohibition against corporate contributions, depending on whether it elects to be treated as a partnership or corporation by the Internal Revenue Service. 11 C.F.R. § 110.1(g). If treated as a partnership, it is possible that 3eDC made an excessive in-kind contribution to the McCain Committee in violation of 2 U.S.C. § 441a when it reduced the committee’s debt as that reduction was well in excess of the maximum contribution of \$2,300 per partner as allowed by law. 11 C.F.R. § 110.1(e). If 3eDC elected tax treatment as a corporation, it may have made a corporate contribution in violation of 2 U.S.C. § 441b(a) if its agreement with the McCain Committee was not commercially reasonable. Information regarding 3eDC’s tax election is not publicly available. Therefore, it is unclear whether 3eDC is subject to the prohibition against corporate contributions or the contribution limits applicable to partnerships. 11 C.F.R. § 110.1(g). Nonetheless, it is not necessary to investigate 3eDC’s tax status because the Commission concludes that the agreement was commercially reasonable. Thus, there is no reason to believe there is a violation of either section 441a or 441b, as explained below.

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1 The allegations in the complaint raise the question whether 3eDC's reduction of its bill of
2 services to the McCain Committee by \$127,483 was commercially reasonable. Commission
3 regulations provide that a commercial vendor may forgive or settle a debt for less than the full
4 amount owed or may resolve a disputed debt, if it has treated the debt in a commercially
5 reasonable manner and complied with the regulatory requirements in 11 C.F.R. §§ 116.4 and
6 116.10. "Commercial vendor" is defined as "any persons providing goods or services to a
7 candidate or political committee whose usual and normal business involves the sale, rental, lease,
8 or provision of those services." 11 C.F.R. § 116.1(c). For unincorporated vendors, such as
9 3eDC, the amount forgiven is not considered a contribution if the commercial vendor has treated
10 the debt in a commercially reasonable manner and satisfied the relevant requirements of
11 11 C.F.R. § 116.7 or 116.8. *Id.* at § 116.4(a). A vendor can demonstrate that it has treated a debt
12 in a commercially reasonable manner by showing that: (1) the original extension of credit was
13 proper pursuant to 11 C.F.R. § 116.3; (2) the committee has undertaken all reasonable efforts to
14 satisfy the outstanding debt, such as engaging in additional fundraising, reducing overhead and
15 administrative costs, or liquidating assets; and (3) that the vendor has pursued its remedies as
16 vigorously as it would pursue its remedies against a similarly situated non-political debtor, *i.e.*,
17 that it has made oral and written requests for payment, withheld delivery of goods or services
18 until overdue debts are satisfied, imposed additional charges for late payment, referred the debt
19 to a collection service, or litigated for payment on the debt. 11 C.F.R. § 116.4(d).

20 Ongoing committees may resolve disputed debts, but the parties must nevertheless treat a
21 disputed debt in a "commercially reasonable manner" in accordance with 11 C.F.R. § 116.4(a)
22 and (d). A disputed debt, defined as an actual or potential debt or obligation where there is a
23 *bona fide* disagreement between the creditor and the political committee as to the existence of

1 the debt or the amount owed, is not subject to the debt settlement requirements and procedures
2 set forth in 11 C.F.R. §§ 116.7 and 116.8. *See* 11 C.F.R. §§ 116.1(d) and 116.7(c)(2).

3 Commission regulations also state that a commercial vendor may extend credit to a
4 candidate or political committee, provided that the extension of credit is in the ordinary course of
5 the vendor's business practices and that the terms of the credit are substantially similar to
6 extensions of credit to non-political entities, and they further provide that an extension of credit
7 includes agreements between a vendor and political committee providing additional time to pay
8 an amount due or the failure of the committee to make full payment by the previously agreed
9 upon due date. 11 C.F.R. §§ 116.1(e) and 116.3(a).

10 Here, the complaint questions the circumstances surrounding the negotiation of the debt
11 the McCain Committee owed to 3eDC. Both 3eDC and the McCain Committee indicate that
12 they had a *bona fide* dispute regarding the amount that the campaign owed and add that the
13 reduction that was ultimately negotiated was commercially reasonable. As discussed below,
14 there is no information to contradict those contentions.

15 First, there is no information to indicate that the original service contract between 3eDC
16 and the campaign, or that their negotiations concerning the amount owed by the campaign, was
17 not proper pursuant 11 C.F.R. § 116.3(c). *See* 11 C.F.R. § 116.4(d)(1). The complaint provides
18 no information to demonstrate that 3eDC deviated from its established procedures and
19 past practices in any of its arrangements with the campaign. *Id.* at § 116.3(c)(1). While 3eDC
20 has not provided specific information to demonstrate that its actions in re-negotiating the fees
21 with the Committee followed the company's established procedures, whether the transaction
22 "conformed to the usual and normal practice in the commercial vendor's trade or industry," or if
23 it was on the same terms as those provided to non-political clients, as required by 11 C.F.R.

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1 § 116.3(c)(1)-(3), 3eDC has provided the Commission with substantial documentation to show
2 that they negotiated a reasonable resolution of a commercial dispute. As part of 3eDC's
3 response to the complaint, it provided thorough documentation regarding the initial service
4 contract, correspondence with each other concerning termination of the contract and negotiation
5 of the debt, and included sworn affidavits from representatives describing the circumstances
6 behind the negotiations. In addition, the Commission obtained lengthy documentation
7 containing the results of the McCain Committee's line item review of its account with 3eDC.
8 See 3eDC Response at Attachment 6 (providing Committee's seven-page summary sent to
9 3eDC). Further, the documentation demonstrates that the parties followed procedures
10 established in those agreements in order to terminate the contract, review invoices, and resolve
11 disputed amounts due.

12 Second, the McCain Committee's efforts to satisfy the outstanding debt were reasonable.
13 See 11 C.F.R. § 116.4(d)(2). As part of its efforts to resolve the outstanding debt, the McCain
14 Committee invoked the "Audit" provision from the Services and License Agreement, before the
15 sixty-day deadline for payment of the final invoices totaling approximately \$725,000, and
16 completed a review of 3eDC's records pertaining to the Committee's account that led to the
17 eventual reduction of the 3eDC's bill to the Committee. Although section 116.4(d)(2) lists other
18 efforts that can indicate reasonableness, such as engaging in further fundraising efforts, the
19 regulation states that the examples shown in the regulations are not an exhaustive list. In this
20 matter, the Committee's prompt and thorough review of 3eDC's records suggests that the
21 McCain Committee took reasonable steps to ascertain the correct amount due to the vendor and
22 then paid the amount ahead of schedule. The Committee's actions in accepting the additional
23 terms proposed by 3eDC to settle the debt also support this conclusion.

1 Although section 116.4(d)(2) requires that a committee undertake all reasonable efforts to
2 satisfy the outstanding debt, the McCain Committee did not admit that anything more than
3 \$585,001.83 was due on the contract, and it paid that amount. 3eDC may not have initially
4 agreed with that figure, but it accepted the results of the McCain Committee's audit. Thus, the
5 requirement that the McCain Committee use "all" reasonable efforts is satisfied in this case.

6 Finally, the information available supports a finding that 3eDC pursued its remedies as
7 vigorously as it would pursue its remedies against a nonpolitical debtor in similar circumstances.
8 11 C.F.R. § 116.4(d)(3). In response to the McCain Committee's failure to pay two invoices,
9 3eDC sought to terminate the service contract and sent a written request for payment. *Id.* at
10 § 116.4(d)(3)(i). In addition, upon receipt of the McCain Committee's written summary
11 proposing adjustments to 3eDC's fees, 3eDC proposed additional terms including interest
12 payments, a payment schedule and late fees. *Id.* at § 116.4(d)(3)(iii). While 3eDC chose not to
13 pursue litigation or refer the McCain Committee's debt to a debt collection service as suggested
14 in the non-exhaustive list found in the Commission's regulations, 3eDC explained that the cost
15 of litigation was one of its considerations in deciding to settle the matter for the amount proposed
16 by the campaign. 11 C.F.R. § 116.4(d)(3)(iv) and (v). 3eDC's business decision to settle the
17 Committee's debt for the bulk of the amount owed, plus interest payments and late fees, rather
18 than spend additional funds in hopes of obtaining an amount closer to \$725,000, does not appear
19 unreasonable.

20 Thus, the available documentation lends support to the contention that the reduction of
21 the McCain Committee's bill was done in a commercially reasonable manner. As discussed
22 above, the documentation also accounts for the time that passed between the termination of the
23 service contract and the campaign's payment of the amount owed to 3eDC. In past cases in

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1 which the Commission determined that in-kind contributions resulted, the cases involved long
2 delays in payment that did not appear commercially reasonable. See MUR 5396 (Bauer for
3 President 2000) (respondents entered into conciliation agreement to resolve, *inter alia*, 441a and
4 441b violations resulting from extensions of credit from three different vendors totaling over
5 \$700,000 and owed for periods between 105 to 235 days); MUR 5047 (Clinton/Gore '96) (the
6 Commission found reason to believe that the committee and two of its vendors violated section
7 441b by accepting or making illegal corporate extensions of credit totaling over \$900,000 that
8 were unresolved for four months or longer, but took no further action because the debts had been
9 paid in full and some debt collection activity had occurred).

10 In this matter, the parties negotiated a termination agreement within 7 days of 3eDC's
11 notification of the campaign's material breach of the contract. The Committee's audit of 3eDC's
12 records then lasted almost two months, from July to September 2007. However, upon
13 completion of the audit, the campaign sent a detailed summary to 3eDC proposing adjustments
14 in the invoices, and within a few days, the parties negotiated a final agreement for payment of
15 the remaining amount due to 3eDC, that included a payment schedule, interest payments and late
16 fees. The campaign immediately started the required payments in October 2007 and paid the
17 debt off early.

18 Accordingly, the Commission finds no reason to believe that 3eDC, LLC violated
19 2 U.S.C. §§ 441a or 441b.

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4 **RESPONDENT: Rick Davis**

MUR: 6023

5
6
7 **I. INTRODUCTION**

8
9 This matter is based upon a complaint filed with the Federal Election Commission ("the
10 Commission") by David Donnelly, *see* 2 U.S.C. § 437g(a)(1), alleging that Rick Davis, part
11 owner of 3eDC, LLC ("3eDC"), an Internet consulting company providing services to John
12 McCain's campaign, made a prohibited corporate contribution to John McCain 2008, Inc. and
13 Joseph Schmuckler, in his official capacity as treasurer ("McCain Committee"), when 3eDC
14 reduced the campaign's debt owed to 3eDC by over \$100,000.

15 Based upon the available information, including a written response from the respondent
16 denying the allegations, there is no information to indicate that Rick Davis may have committed
17 the violation alleged in the complaint. Accordingly, the Commission finds no reason to believe
18 that Rick Davis violated the Federal Election Campaign Act of 1971, as amended ("the Act"), in
19 connection with the allegations in this matter.

20 **II. FACTUAL AND LEGAL ANALYSIS**

21 **A. Factual Background**

22 The McCain campaign hired 3eDC, a company partly owned by McCain campaign
23 manager Rick Davis, to develop and maintain the campaign's website. 3eDC provided those
24 services, which included website development, e-mail list building, social networking tools, and
25 database management from January through May 2007. The complaint alleges that 3eDC
26 reduced its bill for Web services provided to the McCain campaign by \$107,475 at a time when

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1 the campaign was struggling financially and attempting to cut costs, resulting in a prohibited
2 corporate contribution under 2 U.S.C. § 441b and 11 C.F.R. § 100.55. The complaint refers to
3 public statements by the McCain campaign that there were billing errors and that the bill was
4 renegotiated. However, the complaint questions how “a campaign manager can renegotiate a
5 contract with a firm that he partly owns without at least the appearance that he has used his
6 influence with both parties to reduce the debt.” Complaint at 6.

7 A number of press articles report that Rick Davis arranged for the campaign’s initial
8 service contract with the vendor, 3eDC, and that the contract with 3eDC “initially brought
9 objections from top [McCain] advisers,” with some individuals accusing Davis of “self-dealing.”
10 Michael Cooper, *Savior or Machiavelli - McCain’s Top Aide Carries On*, N.Y. TIMES, Oct. 23,
11 2007, at A26; Matthew Mosk, *Top McCain Adviser has Found Success Mixing Money, Politics*,
12 WASHINGTON POST, June 26, 2008, at A01. However, Davis claims that he was not involved in
13 negotiating the initial contract or in any other discussions concerning 3eDC. In his response to
14 the complaint, Davis explains that he was “only a passive investor in 3eDC,” and not involved in
15 its day-to-day operations. Davis Response to Complaint (“Davis Response”) at 1. According to
16 Davis and other information obtained by the Commission, Davis recused himself from any
17 involvement with 3eDC while working for the McCain campaign. *Id.* at 1. There is conflicting
18 publicly available information, however, on whether Davis disclosed his financial interest in
19 3eDC to McCain early in the campaign. Cooper, *supra* at A26; Edward T. Pound, *Troublesome*
20 *Resumes*, U.S. NEWS & WORLD REPORT, May 28, 2007, at 50.

21 Information available reveals that the McCain Committee and 3eDC had a legitimate
22 dispute regarding the amount the campaign owed to 3eDC. According to information obtained
23 by the Commission, 3eDC and the McCain campaign entered into a contract for services on

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1 January 26, 2007. The contract details 3eDC's fee structure for its services to the McCain
2 Committee, including base fees, hourly rates for additional work, and administrative fees. In
3 May 2007, 3eDC decided to invoke the contract's termination clause because the campaign had
4 failed to pay two outstanding invoices when they were due, which 3eDC considered to be a
5 material breach of the agreement. Initially, 3eDC sent a letter, dated May 11, 2007, to the
6 McCain Committee requesting that it pay \$164,138.21, the total owed on those invoices, in order
7 to cure the material breach. The parties discussed the matter and decided to terminate the service
8 agreement. They entered into a Termination Agreement and Release ("Termination
9 Agreement"), dated May 18, 2007, that required payment of the overdue invoices totaling
10 \$164,138.21, required 3eDC to deliver a Final Statement of unpaid services to the campaign by
11 May 25, 2007, included a provision providing for accrual of 1% interest per month for amounts
12 that were past due, and required the campaign to make full payment, plus interest, within 60 days
13 of receipt of the Final Statement. The Termination Agreement estimated that the remaining
14 invoices to be included in the Final Statement totaled approximately \$725,000. The McCain
15 campaign paid \$164,138.21 upon execution of the agreement on May 18, 2007.

16 Information obtained by the Commission indicates that 3eDC never delivered a "Final
17 Statement" to the campaign, but instead "revised and confirmed the existing pending invoices."
18 Nevertheless, before the sixty-day deadline, the McCain Committee sent a letter dated July 16,
19 2007, invoking an "audit" provision from the Services and License Agreement that allowed the
20 campaign to conduct a review and analysis of the vendor's records supporting the fees and
21 expenses invoiced by 3eDC. The Commission's information indicates that the McCain
22 Committee also began its review in response to news reports alleging that Rick Davis personally
23 benefitted from the committee's contract with 3eDC.

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1 Upon completing its review, the McCain Committee submitted a seven-page summary to
2 3eDC, dated September 10, 2007, that proposed adjustments for fees that it believed were in
3 error or where it believed there was insufficient documentation to support the expenses, and
4 proposed to pay a total of \$585,001.83 to settle the debt. The McCain Committee's summary
5 provides a detailed account of the disputed invoice amounts. Specifically, the Committee
6 proposed a reduction in 3eDC's hosting charges by \$22,022.42; in Internet advertising by
7 \$42,341.34; and website content and development by \$63,119.24. During the course of its
8 review, the campaign also identified adjustments in 3eDC's favor, which it credited to 3eDC. In
9 total, the McCain Committee proposed a reduction of approximately \$127,483.

10 While 3eDC did not agree with all of the adjustments, it believed that the proposal was
11 commercially reasonable and agreed to accept the committee's proposal, subject to some
12 additional terms. Those terms included required interest payments of 6% a year, monthly
13 installments, a payment schedule, late fees of 1% per month, an acceleration clause if the
14 campaign ceased operating before December 1, 2008, and required that the McCain Committee
15 not seek reimbursement for the cost of its audit. 3eDC believed that accepting the campaign's
16 proposal, along with the additional terms, was commercially reasonable and the best course of
17 action to "resolve the matter in order to get paid." 3eDC balanced the costs of potential
18 litigation, which would also result in more time passing without receiving payments from the
19 campaign, compared with the "relatively small amount involved." Based on those
20 considerations, settling the matter at the reduced amount proposed made the most "financial
21 sense." Ultimately in September 2007, both parties agreed to these terms, which required 15
22 monthly payments that would end on December 25, 2008. According to information obtained by

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1 the Commission, all required monthly payments were made to 3eDC pursuant to the parties'
2 negotiated resolution, and the full amount was paid several months early.

3 **B. Legal Analysis**

4 The Act prohibits corporations from making contributions in connection with federal
5 elections. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b)(1). As a limited liability company, 3eDC
6 may be subject to the prohibition against corporate contributions, depending on whether it elects
7 to be treated as a partnership or corporation by the Internal Revenue Service. 11 C.F.R.
8 § 110.1(g). If treated as a partnership, it is possible that 3eDC made an excessive in-kind
9 contribution to the McCain Committee in violation of 2 U.S.C. § 441a when it reduced the
10 committee's debt as that reduction was well in excess of the maximum contribution of \$2,300
11 per partner as allowed by law. 11 C.F.R. § 110.1(e). If 3eDC elected tax treatment as a
12 corporation, it may have made a corporate contribution in violation of 2 U.S.C. § 441b(a) if its
13 agreement with the McCain Committee was not commercially reasonable. Information
14 regarding 3eDC's tax election is not publicly available. Therefore, it is unclear whether 3eDC is
15 subject to the prohibition against corporate contributions or the contribution limits applicable to
16 partnerships. 11 C.F.R. § 110.1(g). Nonetheless, it is not necessary to investigate 3eDC's tax
17 status because the Commission concludes that the agreement was commercially reasonable, and
18 thus, there is no reason to believe there is a violations of either section 441a or 441b, as
19 explained below.

20 The allegations in the complaint raise the question whether 3eDC's reduction of its bill of
21 services to the McCain Committee by \$127,483 was commercially reasonable. Commission
22 regulations provide that a commercial vendor may forgive or settle a debt for less than the full
23 amount owed or may resolve a disputed debt, if it has treated the debt in a commercially

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1 reasonable manner and complied with the regulatory requirements in 11 C.F.R. §§ 116.4 and
2 116.10. "Commercial vendor" is defined as "any persons providing goods or services to a
3 candidate or political committee whose usual and normal business involves the sale, rental, lease,
4 or provision of those services." 11 C.F.R. § 116.1(c). For unincorporated vendors, such as
5 3eDC, the amount forgiven is not considered a contribution if the commercial vendor has treated
6 the debt in a commercially reasonable manner and satisfied the relevant requirements of
7 11 C.F.R. § 116.7 or 116.8. *Id.* at § 116.4(a). A vendor can demonstrate that it has treated a debt
8 in a commercially reasonable manner by showing that: (1) the original extension of credit was
9 proper pursuant to 11 C.F.R. § 116.3; (2) the committee has undertaken all reasonable efforts to
10 satisfy the outstanding debt, such as engaging in additional fundraising, reducing overhead and
11 administrative costs, or liquidating assets; and (3) that the vendor has pursued its remedies as
12 vigorously as it would pursue its remedies against a similarly situated non-political debtor, *i.e.*,
13 that it has made oral and written requests for payment, withheld delivery of goods or services
14 until overdue debts are satisfied, imposed additional charges for late payment, referred the debt
15 to a collection service, or litigated for payment on the debt. 11 C.F.R. § 116.4(d).

16 Ongoing committees may resolve disputed debts, but the parties must nevertheless treat a
17 disputed debt in a "commercially reasonable manner" in accordance with 11 C.F.R. § 116.4(a)
18 and (d). A disputed debt, defined as an actual or potential debt or obligation where there is a
19 *bona fide* disagreement between the creditor and the political committee as to the existence of
20 the debt or the amount owed, is not subject to the debt settlement requirements and procedures
21 set forth in 11 C.F.R. §§ 116.7 and 116.8. *See* 11 C.F.R. §§ 116.1(d) and 116.7(c)(2).

22 Commission regulations also state that a commercial vendor may extend credit to a
23 candidate or political committee, provided that the extension of credit is in the ordinary course of

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1 the vendor's business practices and that the terms of the credit are substantially similar to
2 extensions of credit to non-political entities, and they further provide that an extension of credit
3 includes agreements between a vendor and political committee providing additional time to pay
4 an amount due or the failure of the committee to make full payment by the previously agreed
5 upon due date. 11 C.F.R. §§ 116.1(e) and 116.3(a).

6 Here, the complaint questions the circumstances surrounding the negotiation of the debt
7 the McCain Committee owed to 3eDC. Both 3eDC and the McCain Committee indicate that
8 they had a *bona fide* dispute regarding the amount that the campaign owed and add that the
9 reduction that was ultimately negotiated was commercially reasonable. As discussed below,
10 there is no information to contradict those contentions.

11 First, there is no information to indicate that the original service contract between 3eDC
12 and the campaign, or that their negotiations concerning the amount owed by the campaign, was
13 not proper pursuant 11 C.F.R. § 116.3(c). See 11 C.F.R. § 116.4(d)(1). The complaint provides
14 no information to demonstrate that 3eDC deviated from its established procedures and past
15 practices in any of its arrangements with the campaign. *Id.* at § 116.3(c)(1). While there is no
16 specific information to demonstrate that 3eDC's actions in re-negotiating the fees with the
17 Committee followed the company's established procedures, whether the transaction "conformed
18 to the usual and normal practice in the commercial vendor's trade or industry," or if it was on the
19 same terms as those provided to non-political clients, as required by 11 C.F.R. § 116.3(c)(1)-(3),
20 information available to the Commission shows that 3eDC and the McCain Committee
21 negotiated a reasonable resolution of a commercial dispute. The Commission obtained
22 documentation regarding the initial service contract, correspondence between the parties
23 concerning termination of the contract and negotiation of the debt, and sworn affidavits from

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1 representatives describing the circumstances behind the negotiations. In addition, the
2 Commission obtained lengthy documentation containing the results of the McCain Committee's
3 line item review of its account with 3eDC. Further, the documentation demonstrates that the
4 parties followed procedures established in those agreements in order to terminate the contract,
5 review invoices, and resolve disputed amounts due.

6 Second, the McCain Committee's efforts to satisfy the outstanding debt were reasonable.
7 See 11 C.F.R. § 116.4(d)(2). As part of its efforts to resolve the outstanding debt, the McCain
8 Committee invoked the "Audit" provision from the Services and License Agreement, before the
9 sixty-day deadline for payment of the final invoices totaling approximately \$725,000, and
10 completed a review of 3eDC's records pertaining to the Committee's account that led to the
11 eventual reduction of the 3eDC's bill to the Committee. Although section 116.4(d)(2) lists other
12 efforts that can indicate reasonableness, such as engaging in further fundraising efforts, the
13 regulation states that the examples set forth therein are not an exhaustive list. In this matter, the
14 Committee's prompt and thorough review of 3eDC's records suggests that the McCain
15 Committee took reasonable steps to ascertain the correct amount due to the vendor and then paid
16 the amount ahead of schedule. The Committee's actions in accepting the additional terms
17 proposed by 3eDC to settle the debt also support this conclusion.

18 Although section 116.4(d)(2) requires that a committee undertake all reasonable efforts to
19 satisfy the outstanding debt, this requirement appears to be directed at committees that wish to
20 pay less on a debt than they admit is owed. Here, the McCain Committee did not admit that
21 anything more than \$585,001.83 was due on the contract, and it paid that amount. 3eDC may
22 not have initially agreed with that figure, but it accepted the results of the McCain Committee's

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1 audit. Thus, the requirement that the McCain Committee use "all" reasonable efforts is satisfied
2 in this case.

3 Finally, the information available supports a finding that 3eDC pursued its remedies as
4 vigorously as it would pursue its remedies against a nonpolitical debtor in similar circumstances.
5 11 C.F.R. § 116.4(d)(3). In response to the McCain Committee's failure to pay two invoices,
6 3eDC sought to terminate the service contract and sent a written request for payment. *Id.* at
7 § 116.4(d)(3)(i). In addition, upon receipt of the McCain Committee's written summary
8 proposing adjustments to 3eDC's fees, 3eDC proposed additional terms including interest
9 payments, a payment schedule and late fees. *Id.* at § 116.4(d)(3)(iii). While 3eDC chose not to
10 pursue litigation or refer the McCain Committee's debt to a debt collection service as suggested
11 in the non-exhaustive list found in the Commission's regulations, information available indicates
12 that the cost of litigation was one of 3eDC's considerations in deciding to settle the matter for
13 the amount proposed by the campaign. 11 C.F.R. § 116.4(d)(3)(iv) and (v). 3eDC's business
14 decision to settle the Committee's debt for the bulk of the amount owed, plus interest payments
15 and late fees, rather than spend additional funds in the hopes of obtaining an amount closer to
16 \$725,000, does not appear unreasonable.

17 Thus, the available documentation lends support to the contention that the reduction of
18 the McCain Committee's bill was done in a commercially reasonable manner. As discussed
19 above, the documentation also accounts for the time that passed between the termination of the
20 service contract and the campaign's payment of the amount owed to 3eDC. In past cases in
21 which the Commission determined that in-kind contributions resulted, the cases involved long
22 delays in payment that did not appear commercially reasonable. See MUR 5396 (Bauer for
23 President 2000) (respondents entered into conciliation agreement to resolve, *inter alia*, 441a and

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441b violations resulting from extensions of credit from three different vendors totaling over \$700,000 and owed for periods between 105 to 235 days); MUR 5047 (Clinton/Gore '96) (the Commission found reason to believe that the committee and two of its vendors violated section 441b by accepting or making illegal corporate extensions of credit totaling over \$900,000 that were unresolved for four months or longer, but took no further action because the debts had been paid in full and some debt collection activity had occurred).

In this matter, the parties negotiated a termination agreement within 7 days of 3eDC's notification of the campaign's material breach of the contract. The Committee's audit of 3eDC's records then lasted almost two months, from July to September 2007. However, upon completion of the audit the campaign sent a detailed summary to 3eDC proposing adjustments in the invoices, and within a few days, the parties negotiated a final agreement for payment of the remaining amount due to 3eDC, that included a payment schedule, interest payments and late fees. The campaign immediately started the required payments in October 2007 and paid the debt off early.

Accordingly, the Commission finds no reason to believe that Rick Davis violated 2 U.S.C. §§ 441a or 441b in connection with the allegations in this matter.

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